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No. 06-_____ 06-111

In the

Supreme Court of the United States

WILLIAM ANTHONY ELLIS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CIRCUIT SPLIT ABOUT WHETHER THE REASONABLENESS REVIEW MANDATED BY UNITED STATES V. BOOKER, 543 U.S. 220 (2005) SHOULD BE CONDUCTED BY USING REBUTTABLE PRESUMPTIONS OF REASONABLENESS OR SOME OTHER STANDARD OF REVIEW?

II. WHETHER THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE USE OF REBUTTABLE PRESUMPTIONS OF REASONABLENESS AND A DEFERENTIAL STANDARD FOR REVIEW RESULT IN SIXTH AMENDMENT VIOLATIONS BECAUSE THE UNITED STATES SENTENCING GUIDELINES ARE EFFECTIVELY MANDATORY?

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William Anthony Ellis respectfully petitions the Court for a Writ of Certiorari to review the judgment of the Seventh Circuit Court of Appeals entered in this cause on March 8, 2006. A timely Motion for Rehearing and Rehearing en banc was denied on April 20, 2006. 1a.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals is reported as *United States v. Ellis*, 440 F.3d 434 (7th Cir. 2006). 1a

JURISDICTION

The Seventh Circuit Court of Appeals had jurisdiction pursuant to 18 U.S.C. 3742. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment is involved because it would be violated if the United States Sentencing Guidelines have become effectively mandatory. The Sixth Amendment is included as Appendix C.

INTRODUCTION

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the United States Sentencing Guidelines were unconstitutional because they violated the Sixth Amendment. This Court, however, expressed concern about totally abandoning the Guidelines. The Guidelines had been developed over many years and, as a result, were deemed a valuable sentencing resource.

This Court's solution was to hold that the Guidelines were henceforth advisory and not mandatory. As such, federal sentencing judges were bound to consult the Guidelines, but they were not required to impose a sentence within the Guidelines. This Court also held that appellate review of federal sentences would be for "reasonableness."

The unanswered questions after *Booker* included: 1) the extent of the discretion possessed by District Courts to impose sentences outside of the calculated guideline range; 2) the extent to which any discretion possessed by District Courts would be exercised; 3) the extent to which appellate courts would encourage or discourage

outside-of-the-guideline sentences; and 4) the methodology that federal appellate courts would use to conduct the reasonableness review.

There were many possible post-*Booker* scenarios. One scenario was a return to pre-Guideline sentencing procedures where District Courts exercised broad discretion to impose whatever sentence that the District Court deemed appropriate. In such a scenario, the Guidelines would suggest a possible sentencing range only.

A second scenario would be pre-*Booker* business as usual where District Courts would pay lip service to the advisory guidelines but where the sentences actually imposed would almost always be within the calculated guideline range. Numerous in-between scenarios could also be envisioned.

The scenario that would emerge would depend, in significant part, on how the Circuit Courts viewed their role in the sentencing process. For example, the Circuit Courts could give great deference to the District Courts or the Circuit Courts could micromanage by substituting their own views as to the appropriate sentence.

Another scenario would be for the Circuit Courts to give great deference to the calculated guidelines. Such deference would encourage the District Courts to impose within-guideline sentences because such sentences would be affirmed. Such deference, however, creates the risk that the Guidelines would become effectively mandatory and that, as in the pre-*Booker* environment, criminal defendants would be sentenced using facts not found by a jury or admitted to by the defendant.

Because these are difficult questions, it is not surprising that there would be differences of opinion about how these significant questions should be answered.

Indeed, there is a split among the Circuits about how appellate review should be conducted. The Seventh Circuit, among other Circuits, treats any sentence that is within the calculated guideline range as being "presumptively reasonable." A sentence above or below the calculated range is not entitled to the presumption. As discussed *infra,* other Circuits have taken a different approach.

It is the Petitioner's position that "presumptively reasonable"

review has made the guidelines effectively mandatory in those Circuits where this standard of review is being used.

Among other things, a sentencing judge has no incentive to sentence outside of the calculated guideline range. Specifically, an outside-of-the-guidelines sentence would be subject to a greater level of appellate scrutiny and to possible reversal. By contrast, a sentence within the calculated guideline range would almost always be affirmed. While the Petitioner is not aware of any formal statistics, his experience is that an overwhelming percentage of post-*Booker* sentences are in fact within the calculated guideline range.

In addition, a criminal defendant appealing a sentence within the calculated guideline range has almost no prospect of success in the "presumptively reasonable" Circuits. Again, the Petitioner is not aware of any formal statistical studies. However, a survey of cases in the Seventh Circuit and other Circuits that have adopted the "presumptively reasonable" standard of review reveals that "presumptively reasonable" has become the functional equivalent of "per-se reasonable."

Moreover, the Seventh Circuit and its sister "presumptively reasonable" Circuits have given no guidance about how the presumption can be rebutted. As a result, in the "presumptively reasonable" Circuits, the presumption is almost impossible to rebut. Thus, sentences within the guidelines are routinely affirmed and arguments about why a sentence below the guidelines should have been imposed fall on deaf ears.

In sum, federal sentencing practice in the "presumptively reasonable" Circuits has, for all practical purposes, returned to the pre-*Booker* procedure: sentences within the guidelines are routinely imposed and approved; sentences outside of the guidelines are treated as being the equivalent to pre-*Booker* departures, i.e. rarely imposed and if imposed, subject to enhanced appellate scrutiny. *See, e.g., United States v. Dean*, 414 F.3d 725 (7th Cir. 2005) (holding that sentences district courts impose outside of the calculated guideline range must offer a more compelling accounting than if the sentence is within the range. If the deviation from the range is significant, a greater justification is required in proportion to the

extent of the deviation); *United States v. Smith*, 440 F.3d 704 (5th Cir. 2006) (same); *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006); *United States v. McMannus*, 436 F.3d 871 (8th Cir. 2006). *See, also, United States v. Cage*, —F.3d— (10th Cir. 6/8/06) (which reversed a sentencing court's decision to depart from a 46-57 month guideline to 6 days in prison. The sentence was unreasonable because it was a too extreme divergence from the advisory guideline range.)

The Petitioner is respectfully asking this Court to grant the Petition so that the Circuit split about the standards for post-*Booker* appellate review of sentences can be resolved. This Court could also provide needed guidance to federal sentencing courts and to the federal bar about the distinction between "consulting" advisory Guidelines and treating the Guidelines as effectively mandatory by routinely sentencing within the calculated guideline range.

STATEMENT OF THE CASE

In 1995, the Petitioner became bishop of the Apostolic Pentecostal Church, which is located in Chicago, Illinois. The Petitioner was head of the church. He worked hard, with the result that both the church's membership and its weekly collections had dramatically grown.

The Petitioner was initially charged with five counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1), one count of failure to file an income tax return in violation of 26 U.S.C. 7203, and one count of causing a financial institution to fail to file a report in violation of 31 U.S.C. 5313(a).

Investigation showed that the Petitioner had supplemented his salary by receiving cash from the Sunday collections. In addition, the investigators concluded that the Petitioner had used church funds to pay for personal expenses. The Petitioner did not report this income on his tax returns.

The Petitioner ultimately entered a plea to making a false tax return for the year 1997.

The pre-sentence officer proposed upward enhancements for abuse of trust and for receiving over $10,000 in income from an illegal source without reporting it.

The pre-sentence officer proposed the abuse of trust enhancement even though this was a tax case and even though the Petitioner had not been accused of taking money from the church. The illegal source enhancement was proposed even though the Petitioner was not charged with embezzling money from the church. With these enhancements, the Petitioner's proposed calculated guidelines were 18-24 months. Without these enhancements, the proposed calculated guidelines would have been 8-14 months.

The Petitioner challenged these two enhancements. The Petitioner had not admitted to the facts being used to enhance his sentence. Among other things, the Petitioner had presented evidence that he could have received a higher salary from the church had he asked for it. The Petitioner argued that he took income in the form of cash and payment of expenses for tax reasons and that he never intended to harm the church. The Petitioner pointed out that the church was indifferent as to the form of payment because the church would be in the same economic position whether it paid the Petitioner by way of salary or by some other method.

In addition, because this was a tax case, the plea to filing a false tax return did not require the Petitioner to admit to the facts being used to enhance his sentence. The factual basis for the offense of conviction only required admissions that the return itself was intentionally false.

The Petitioner also presented arguments about why a sentence below the calculated guidelines should be imposed. Among other things, the Petitioner presented evidence of a lifetime of good works and evidence from numerous church members who both attested to the Petitioner's contributions to the church and advocated leniency.

At sentencing, the District Court used judicially found facts to conclude that the Petitioner had abused a position of trust and had received income from an illegal source. The calculated guidelines were thus 18-24 months.

While acknowledging the Petitioner's many good works, the District Court chose to impose a sentence within the calculated range or 18 months.

The Petitioner appealed. The Petitioner challenged the two Guideline enhancements and argued that the 18-month sentence was unreasonable.

The Seventh Circuit held that the District Court did not commit clear error when it concluded that the Petitioner had abused a position of trust. 440 F.3d at p. 437.

The Seventh Circuit also held that the District Court did not commit clear error when it scored the illegal income aggravator. 440 F.3d at p 438.

As to the reasonableness of the within-the-guideline sentence, the Seventh Circuit began with its position that a sentence within a properly calculated Guideline range "is entitled to a rebuttable presumption of reasonableness," citing *United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir. 2005). The Seventh Circuit also held that the presumption is deferential and that a criminal defendant can only rebut the presumption "by demonstrating that the sentence is unreasonable when measured against the section 3553(a) factors," citing *United States v. Sharp,* 436 F.3d 730, 738 (7th Cir. 2006).

The Seventh Circuit then held that the sentence was not unreasonable because "[t]he district court went through the proper steps," i.e. the District Court made reference to the section 3553(a) factors before imposing sentence. 440 F.3d at 438. The Seventh Circuit also characterized its review as being "bound by substantial deference" to a within-the-guideline-sentence, i.e. a District Court that sentences within the calculated guidelines is entitled to substantial deference for the sentence chosen. 440 F.3d at 438.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ To Resolve a Circuit Split About Whether the Reasonableness Review Mandated by *Booker* Should Be Conducted by Using Rebuttable Presumptions of Reasonableness or Some Other Standard of Review.

It is the Petitioner's position that the six Circuits that have adopted "presumptively reasonable" review of federal sentences

have effectively returned to the pre-*Booker* days of mandatory guidelines. The Petitioner bases this assertion on two facts:

A. It is virtually impossible for a Petitioner to overcome the presumption. Thus, while the presumption is characterized as "rebuttable" rather than "per-se," the bar has been set so high that the presumption has effectively become irrebutable.

In this regard, sentences have been found unreasonable in the "presumptively reasonable" Circuits for procedural reasons, e.g. the sentencing court insufficiently explained the reasons for the decision made. *E.g., United States v. Vonner,* —F.3d —(6th Cir. 6/29/06); *United States v. Sanchez-Juarez,* 446 F.3d 1109 (10th Cir. 2006). However, in the absence of an express failure to consider the section 3553(a) factors or an incorrect calculation of the guidelines, a sentence within the guideline range is virtually impossible to overturn.

B. Sentences outside of the calculated guideline range are subject to enhanced scrutiny. The methodology appears virtually identical to the pre-*Booker* methodology of analyzing departures from the calculated guideline range. *See, e.g., United States v. Dean,* 414 F.3d 725 (7th Cir. 2005) (holding that district courts that impose sentences outside of the calculated guideline range must offer a more compelling accounting than if the sentence is within the range. If the deviation from the range is significant, a greater justification is required in proportion to the extent of the deviation); *United States v. Smith,* 440 F.3d 704 (5th Cir. 2006) (same); *United States v. Moreland,* 437 F.3d 424 (4th Cir. 2006); *United States v. McMannus,* 436 F.3d 871 (8th Cir. 2006). *See, also, United States v. Cage,* —F.3d— (10th Cir. 6/8/06) (which reversed a sentencing court's decision to depart from a 46-57 month guideline to 6 days in prison. The sentence was unreasonable because it was a too extreme divergence from the advisory guideline range.)

The identity of the analysis strongly suggests that the guidelines are being treated as mandatory, and that District Courts have limited discretion or incentive to impose a sentence that is not within the calculated guideline range.

By contrast, the four Circuits that have rejected "presumptive

reasonableness" have expressed concern about the use of presumptions and the risk that presumptions will make the Guidelines mandatory rather than advisory. While acknowledging that the Guidelines are a useful tool, those Circuits do not require deference to the Guidelines. Rather, these Circuits treat the Guidelines as only one of a number of factors that a federal sentencing court can use when determining the sentence.

As to the specifics, the Seventh Circuit became the first Circuit to adopt the "presumptively reasonable" approach to post-*Booker* appellate review.

On July 7, 2005, a panel of the Seventh Circuit decided *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005). The panel concluded that a sentence within the calculated guideline range should be deemed presumptively reasonable. The components of the panel's reasoning were:

A. The Supreme Court directed lower federal courts to continue consulting the guidelines;

B. The guidelines are a product of eighteen years of careful consideration about the appropriate federal sentence;

C. The panel opined that the Supreme Court likely expected that most sentences would continue to reflect the guideline results;

D. A *per se* or a "conclusively presumed" reasonableness test would undo *Booker* and is therefore inappropriate;

E. The rebuttable presumption of reasonableness is a deferential standard; and

F. "The defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in section 3553(a)."

A computer search indicated that there have been more than 200 cases decided in the Seventh Circuit that cite *Myktiuk*. The Seventh Circuit panels have routinely affirmed within-the-guideline sentences because such sentences are "presumptively reasonable." The results of those cases strongly suggest that despite the cautionary language in *Myktiuk*, "presumptively reasonable" actually means "per-se" reasonable in the Seventh Circuit.

Other Circuits have embraced the Seventh Circuit's approach to appellate review. The Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have adopted the "presumptively reasonable" standard of review for largely the same reasons articulated by the Seventh Circuit in *Myktiuk.*. *United States v. Maras,* 413 F.3d 511 (5th Cir. 2005) (adopting rebuttable presumption); *United States v. Williams,* 436 F.3d 706 (6th Cir. 2006) (same); *United States v. Lincoln,* 413 F.3d 716 (8th Cir. 2005) (same); *United States v. Kristl,* 437 F.3d 1050 (10th Cir. 2005) (same); *United States v. Green,* 436 F.3d 939 (4th Cir. 2006) (same).

In *United States v. Johnson,* 445 F.3d 339 (4th Cir. 2006), the panel elaborated on its belief that "presumptive reasonableness" is the appropriate approach. Specifically:

A. The Guidelines represent two decades of experience;

B. "It would be an oddity, to say the least, if a sentence imposed pursuant to this congressionally sanctioned and periodically superintended process was not presumptively reasonable." 445 F.3d at 342;

C. The section 3553(a) factors have been incorporated into the Guidelines. Thus, the Guidelines are not separate and apart from Congress' objectives;

D. Guideline "sentences are based on individualized factfinding and this factfinding takes place in a process that invites defendants to raise objections and requires courts to resolve them. Both of these features are designed to lead to a presumptively reasonable sentence." 445 F.3d at 343;

E. "Such an individualized sentence is necessarily a presumptively reasonable one." 445 F.3d at 343; and

F. Even though this Court found a constitutional defect in the Guidelines in *Booker*, the values reflected in the guidelines–uniformity, transparency in sentencing, and individualized fact finding–"are features of a reasoned sentencing approach, just as they were to a mandatory one."

By contrast, the First, Second, Third, and Eleventh Circuits have declined to review federal criminal sentences using the "pre-

sumptively reasonable" standard. *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006) (*en banc*). (rejecting the rebuttable presumption reasonableness review); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006) (same); *United States v. Winingear*, 422 F.2d 1241 (11th Cir. 2005) (same).

Many of these opinions note that the government is strongly inviting the Courts to adopt the "presumptively reasonable" approach. These four Circuits have rejected the government's invitation.

The reasons for rejecting the "rebuttable presumption" standard of review include:

A. In *United States v. Jiminez-Beltre*, 440 F.3d 514 (1st Cir. 2006) *(en banc)*, the First Circuit opined that the presumptive approach is not helpful. Rather, the Court concluded that a better standard was that the guidelines do not have controlling weight and if there are identified and persuasive reasons to impose a non-guidelines sentence, the sentencing court should do so. The First Circuit further reasoned that presumptions tend to make the guidelines mandatory, which is contrary to *Booker*. The First Circuit also held that the guidelines are "still generalizations that can point to outcomes that may appear unreasonable to sentencing judges in particular cases." The First Circuit further opined that *Booker* made it possible for sentencing courts to override the guidelines, "subject only to the ultimate requirements of reasonableness."

B. In *United States v. Spence*, 150 Fed.Appx. 15 (2d Cir. 2005), the panel explicitly refused the government's invitation to join other Circuits that had adopted the presumption of reasonableness. The panel pointed to the Second Circuit's post-*Booker* jurisprudence, e.g. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) and *United States v. Canova*, 412 F.3d 331 (2d Cir. 2005), which held that "reasonableness is inherently a concept of flexible meaning, generally lacking precise boundaries." Presumptions are inherently inconsistent with such a concept. The panel further stated that "we can easily conclude, without affording a specific presumption of reasonableness to Guidelines sentences, that the sentence at issue in this case was reasonable."

In *United States v. Fernandez,* 443 F.3d 19 (2d Cir. 2006), the Court explained that reasonableness review involves consideration of the sentence and the procedures employed in reaching that sentence. Reasonableness review does not mean that the appellate court substitutes its judgment for the sentencing court. Rather, reasonableness review is a review for abuse of discretion. "When we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion or made a clearly erroneous finding of fact." The Court specifically held that the Guidelines are no more than a "benchmark, or a point of reference or departure." 443 F.3d at 28.

The Court acknowledged the Circuit split about "presumptive reasonableness." But, the Court expressly refused to establish any presumption. Rather, its preference was to examine the record in each case and determine as to that specific case whether the sentence imposed was reasonable.

C. In *United States v. Cooper,* 437 F.3d 324 (3d Cir. 2006), the Third Circuit concluded that a presumption was unnecessary because appellants bore the burden of proving unreasonableness. While a sentence that falls within the guideline range is more likely to be reasonable than one outside the range, a presumption is not necessary for the appellate court to conduct a reasonableness review.

D. *In United States v. Winingear,* 422 F.3d 1241 (11th Cir. 2005), the Eleventh Circuit rejected the government's invitation to hold that sentences within the calculated range are per-se reasonable. The Court opined that it could determine reasonableness without resorting to presumptions.

United States District Courts are daily imposing criminal sentences. The sharp split among the Circuits about how this process should be both accomplished and reviewed is an important subject for this Court to consider.

For all of these reasons, the Petitioner is respectfully asking this Court to grant the Petition and to to allow briefing of the issues on their merits.

II. This Court Should Grant the Writ To Determine Whether the Use of Rebuttable Presumptions of Reasonableness and a Deferential Standard for Review Result in Sixth Amendment Violations Because the Guidelines Are Effectively Mandatory.

This issue is a sub-issue of the issues raised in the previous section. Specifically, the Seventh Circuit has repeatedly held that deference is to be given to the Guidelines and that any sentence within the calculated guideline range is presumptively reasonable.

The risk of this approach was addressed early on by the Sixth Circuit in *United States v. Webb*, 403 F.3d 373 (6th Cir. 2005). In *Webb*, the majority of the panel expressed concern that undue deference to the guideline calculation could constitute an end-around of *Booker* by creating effectively mandatory guidelines. For that reason a majority of the panel rejected a per-se type of approach. By contrast, the dissenting judge argued that a sentence within the calculated guideline range should always be deemed reasonable.

The Sixth Circuit ultimately adopted the Seventh Circuit's "presumptively reasonable" approach in *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006). However, panels within the Sixth Circuit acknowledge that the Court is struggling to define the meaning of reasonableness review. *E.g., United States v. Vonner*, — F.3d—(6th Cir. 6/29/06). The dissenting judge in *Vonner* was the same judge who had dissented in *Webb*. That judge continued to express the view that a within-the-guideline sentence should always be considered reasonable.

The Seventh Circuit's post-*Booker* jurisprudence appears to follow the reasoning of the dissenting Sixth Circuit judge.

A sample of that jurisprudence is presented to illustrate to this Court how the majority of the Circuit Courts have effectively returned to the pre-*Booker* view that the guidelines are mandatory and that any sentence outside of those guidelines are subject to a heightened level of scrutiny.

At the threshold, the Petitioner submits that this evolving body of case law is leading to consequences that were unintended by this Court when it decided *Booker*. Specifically:

A. While this Court clearly chose to retain rather than abandon the guidelines, it is the Petitioner's position that there is nothing in *Booker* that envisioned the current situation, i.e. sentences that are routinely affirmed because of the extraordinary deference given to sentencing Guidelines;

B. Sentencing courts do not have any incentive to impose a sentence outside of the calculated guidelines. Rather, a sentencing court has every incentive to impose a sentence within the Guidelines because such a sentence is not likely to be reversed by the Circuit Court; and

C. The decisions of six of the Circuits, including the Seventh Circuit, presents the appearance of a hands-off approach to the reasonableness review of a criminal sentence. Exceptional deference is seemingly given to the Guidelines, and it is only a rare case such as *United States v. Cunningham,* 429 F.3d 673 (7th Cir. 2005) where the Seventh Circuit has found fault with the sentencing judge's decision. (Sentence vacated and cause remanded because the sentencing court articulated a reason not found in the record and because the sentencing court did not address the defendant's psychiatric and substance abuse problems.)

As to the Seventh Circuit specifics, that Court has held that the issue is not whether another sentence would be reasonable but whether the sentence imposed by the district court was reasonable. *E.g., United States v. Lopez,* 430 F.3d 854 (7th Cir. 2005).

The Seventh Circuit has also taken the position that it will not act even though a sentence other than the one imposed by the district court would also be reasonable. *E.g., United States v. Newsom,* 428 F.3d 685 (7th Cir. 2005). The Seventh Circuit does not itself balance the section 3553(a) factors and does not make a decision based upon a disagreement with the district court's method of balancing those factors. *E.g., United States v. Lopez,* 430 F.3d 854 (7th Cir. 2005).

The Seventh Circuit has also held that procedural errors, e.g. did the sentencing court follow post-*Booker* sentencing procedures, are not within the scope of the reasonableness review, thus increasing the deference given to the Guidelines when no procedural mistakes are made. *E.g., United States v. Rodriguez-Alvarez,* 425 F.3d 1041 (7th Cir. 2005).

In addition, the Seventh Circuit has routinely affirmed sentences as long as the record indicates that the district court gave some "meaningful consideration to the section 3553(a) factors." *E.g., United States v. Williams,* 430 F.3d 478, 480 (7th Cir. 2005). The sentencing court does not have to discuss all of the factors or make findings as to those factors. *E.g., United States v. Dean,* 414 F.3d 725 (7th Cir. 2005); *United States v. George,* 403 F.3d 470 (7th Cir. 2005).

The standards for "meaningful consideration" thus appear to be relatively low, and, in close cases, the Seventh Circuit has given deference to the sentencing court's apparent consideration of the section 3553(a) factors and/or cursory explanation for the District Court's decision.

For example, in *United States v. Newsom,* 428 F.3d 685 (7th Cir. 2005), the sentencing judge referred to some section 3553(a) factors when imposing sentence (flight, relationship of trust and authority to victims, and seriousness of the offense), but did not mention other factors (depression, alcohol abuse, and work history). On appeal, the defendant argued that the District Court failed properly to take into account these factors when calculating the sentence. The Seventh Circuit acknowledged that the sentencing court did not discuss the three personal factors. However, the Seventh Circuit found no error. The Seventh Circuit noted that the government did not contest these factors. The Seventh Circuit also noted that the sentencing court articulated factors that the sentencing court did deem material. The sentence was affirmed.

In *United States v. Brock,* 433 F.3d 931 (7th Cir. 2006), the defendant argued that he should be given leniency because of his military service and his difficult childhood. As in *Newsom,* the government did not contest these facts. Rather, the government argued that other factors were more important to the sentencing determination. The Seventh Circuit acknowledged that it would have been helpful if the sentencing court had discussed these issues. However, as in *Newsom,* the Seventh Circuit concluded that further explanation was not required because the sentencing court did identify factors that the District Court deemed important, i.e., large number of firearms, the large amount of drugs, the danger of the criminal enterprise to the community, and past leniency shown to the defendant in an unrelated case.

In addition, the Seventh Circuit has repeatedly stated that a defendant may rebut the presumption by demonstrating that a sentence is unreasonable in light of the section 3553(a) factors. *E.g., United States v. Brock,* 433 F.3d 931 (7th Cir. 2006); *United States v. Rodriguez-Alvarez,* 425 F.3d 1041 (7th Cir. 2005); *United States v. Williams,* 425 F.3d 478 (7th Cir. 2005).

However, the Seventh Circuit has not given guidance as to what a criminal defendant must do to carry his or her burden. Rather, the Seventh Circuit has routinely concluded that the burden has not been carried.

These cases are representative of the reasoning that has effectively converted the so-called advisory guidelines into effectively mandatory guidelines.

Because mandatory guidelines are forbidden by *Booker,* the Petitioner submits that this jurisprudence further justifies a decision by this Court to grant the Petition and to give the Circuit Courts and the federal bar guidance about the continuing role of the Guidelines in federal sentencing.

Finally, the Petitioner submits that his own case illustrates the issues presented by this Petition.

The Petitioner, a man in his sixties, had spent a lifetime in various church-related capacities. 18 U.S.C. 3553(a) authorizes a sentencing court to consider the personal characteristics of the defendant when fashioning a federal sentence.

Prior to sentencing, the Petitioner had provided the District Court with substantial evidence of his community good works. Those good works had taken place over his lifetime, and the Petitioner had positively touched the lives of many, many, people.

When the Petitioner came to the Morgan Park church, it was in disarray. Its finances were precarious, and its membership was declining. The Petitioner spent countless hours working on these problems, with the result that the church's financial position had greatly improved, and its membership had shown strong growth. The record showed that the Petitioner was a 24/7 leader of the church and that he was constantly attending to the needs of the less fortunate.

The Petitioner also pointed to his age and health problems and the age and health problems of his wife as reasons to impose a lesser sentence.

Despite all of these factors and despite an otherwise blameless personal history, the District Court selected a sentence within the guideline range.

On appeal, the Petitioner argued that the District Court erred by not concluding that these reasons were sufficient to justify a sentence below the calculated guideline range. The Petitioner also argued that the District Court had erred because that Court based its decision in large part on a personal and categorical belief that paying taxes was important and that anyone convicted of a tax crime deserved harsh treatment.

The Seventh Circuit rejected all of these arguments, finding that the sentence was presumptively reasonable because it was within the calculated guideline range. The Petitioner submits that this decision is simply another example of how the Guidelines in the Seventh Circuit are effectively mandatory.

CONCLUSION

For all of the foregoing reasons, the Petitioner is respectfully asking this Court to grant the Petition so that the Circuit split about "presumptively reasonable" review can be resolved and so that guidance can be given to the lower courts about how the "reasonableness" and the "advisory guideline" prongs of the *Booker* decision are to be interpreted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

William A. ELLIS,
Defendant-Appellant.

No. 05-3676

Argued Jan. 19, 2006.
Decided March 8, 2006.
Rehearing and Rehearing En Banc Denied April 20, 2006.

BEFORE: EASTERBROOK, MANION, and KANNE, Circuit Judges.

MANION, Circuit Judge. William Ellis, former bishop of the Apostolic Pentecostal Church in Morgan Park, Illinois, pleaded guilty to one count of willfully making and subscribing a false income tax return, in violation of 26 U.S.C. § 7206(1). At sentencing, the district court found that Ellis had abused his position of trust and had obtained over $10,000 in illegal income without reporting it. Applying enhancements for this conduct, the court imposed a sentence of eighteen months' imprisonment. Ellis challenges the enhancements as well as the reasonableness of the sentence. We affirm.

I.

William Ellis became bishop of the Apostolic Pentecostal Church ("APC" or the "church") in 1995. Soon thereafter, Ellis proceeded to shake an ostensibly moribund church out of its doldrums, growing the church coffers and drawing more people into the pews. The weekly ***436** collections rose from $7,000 to $41,000, and church membership increased from 500 to 2,000 people. Ellis was the head of the church; although APC had a board, Ellis "would simply issue directives to be followed by the board." APC rewarded Ellis for his efforts with a healthy salary: in his tax return for 1997, for instance, he claimed that he earned $109,924.

Nonetheless, Ellis chose to supplement his salary by taking money directly from the Sunday collection without reporting it on his tax returns. According to former APC officials, shortly after Ellis began his work there, he demanded $1,000 from the Sunday collection, a practice that he followed on most subsequent Sundays. Ellis explained that he wanted the money as cash rather than as part of his salary in order to avoid taxes.

Although his flock was not aware of Ellis's actions, some officials apparently knew and raised questions about the practice. The chairman of the APC board, for instance, questioned Ellis about it, telling him it amounted to "stealing" and "deceiving God's people." Ellis rationalized his actions by saying "I bring it in, and I take it out." Ellis also warned the chairman of the board "[d]on't muzzle the ox." When a deacon told him that his actions were wrong, Ellis responded "[t]hat's the way you take care of your pastor?" and "[y]ou have a lot to learn about how to take care of your pastor." In order to cover themselves, several APC officials who were aware of Ellis's practice made notes about the payments to him in the records of the weekly offering sheets. Ellis instructed them to stop making the records. Despite assurances that the church would raise his salary if it was not enough, Ellis refused such an arrangement.

In addition to the money taken from the Sunday collections, Ellis also failed to include on his tax returns sundry other benefits, such as a Mercedes that he used for both personal and church business, making personal credit card and life insurance payments with church funds, and using the APC credit card for personal expendi-

tures. From these benefits and the plundering of the collection plate, the government calculated that Ellis had additional gross income in the amount of $520,602 in the years of 1996 through 2001, resulting in a large tax deficit.

The government indicted Ellis on five counts of willfully making and subscribing a false income tax return, in violation of 26 U.S.C. § 7206(1), one count of failure to file an income tax return, in violation of 26 U.S.C. § 7203, and one count of causing a domestic financial institution to fail to file a report required by 31 U.S.C. § 5313(a). Ellis pleaded guilty to one count of making a false tax return for the year 1997. At the sentencing hearing, the district court heard testimony and arguments regarding potential enhancements for abuse of a position of trust and obtaining over $10,000 in income from illegal sources without reporting it. The district court imposed both enhancements, which produced a Guidelines range of 18 to 24 months. After reflecting on Ellis's many good works and the severity of his crime, the district court sentenced him to 18 months' imprisonment. Ellis appeals.

II.

A.

Ellis challenges each of the two enhancements that the district court imposed. "Post-*Booker* we continue to review the court's application of the Sentencing Guidelines de novo and its factual findings for clear error." *United States v. Bothun*, 424 F.3d 582, 586 (7th Cir.2005); *see also* ***437** *United States v. Mabrook*, 301 F.3d 503, 510 (7th Cir.2002).

The abuse of a position of trust enhancement provides "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels." U.S.S.G. § 3B1.3; see *United States v. Baldwin*, 414 F.3d 791, 798 (7th Cir.2005). For the enhancement to apply, Ellis must have: (1) occupied a position of trust and (2) abused that position in a manner that

significantly facilitated the commission or concealment of his offense. *See United States v. Cruz*, 317 F.3d 763, 766 (7th Cir.2003). In making our determination, we analyze the circumstances from the perspective of the victim, looking beyond formal labels to the actual relationship that existed and the responsibilities that the victim entrusted to Ellis. *See Baldwin*, 414 F.3d at 798.

[1] [2] The district court did not commit clear error when it determined that Ellis had abused a position of trust. Ellis argues that the enhancement is improper because APC, whose trust he abused, was not a victim of his tax fraud because it was financially prospering under his pastoral care. This is less than convincing. To begin with, even if we were to accept Ellis's victimless theory, the enhancement does not require a particular "victim" relationship between the criminal and the person or group whose trust has been abused. *See Cruz*, 317 F.3d at 766 ("[c]ourts may apply the abuse of trust enhancement even if the defendant did not occupy a position of trust in relation to the victim of the offense of conviction"). Here, there can be no doubt that Ellis held a position of trust in the church and used his position to facilitate this crime. Specifically, Ellis, who was in complete control of the church, demanded cash payments directly from the Sunday offering. The church did not authorize this; the few people who knew about the practice challenged him, but were cowed by haughty rebukes about the proper treatment of a pastor. Ellis also attempted to thwart the members of the church who were keeping track of these payments in order to better conceal his crime. Ellis's tax fraud was only possible because of his bishop's chair.

In any event, it is clear that APC was a victim. Ellis claims that the offers to improve his salary by the head of the APC board (while trying to talk Ellis out of stealing from the collection plate) and the healthiness of church finances prove his point that he deserved (and thus took) more. They do not. While APC might have been willing to increase his salary, that was a decision for the church, not for him. What Ellis committed was theft; he did not tell APC that he wanted an increased salary and had not received permission for the additional money. Nor can the overall healthiness of church finances salvage his actions. Ellis's argument, essentially a slightly more sophisticated version of "I bring it in, and I can take it out,"

betrays a fundamental misapprehension. The funds were not his. While no doubt his skillful ministry explains to a large extent the uptick in contributions, they were contributions to the church, not to him. The church was not entitled to just a healthy cut of the increased revenues; it was entitled to all of it. Clearly, APC was a victim of Ellis's scheme to extract tax-free income.

[3] Ellis also challenges the imposition of an enhancement for failure to report more than $10,000 in income from an illegal source. U.S.S.G. § 2T1.1(b)(1). Ellis suggests that the church's revived financial state and some suggestions that he could be given a raise proved that this money was not from an illegal source. Again, the ***438** district court did not commit clear error. As discussed above, Ellis stole from the Sunday offerings, taking thousands of dollars without permission from the church. Moreover, he used APC funds to pay his personal credit cards and life insurance, and racked up thousands more on APC credit cards for personal expenditures. Ellis contends that the government failed to show his intent to commit theft by deception, but such intent can be shown from circumstantial evidence, *see, e.g., People v. Lambert,* 195 Ill.App.3d 314, 141 Ill.Dec. 932, 552 N.E.2d 300, 306 (1990), and has been shown by the evidence here. The more than $500,000 that Ellis took from APC during the course of his episcopacy was derived from his illegal activities, making the enhancement completely appropriate.

B.

[4] Ellis also argues that his sentence was unreasonable. In our post-*Booker* world, a district court has the obligation to correctly compute the Guidelines range and then craft a reasonable sentence, consulting the factors found in 18 U.S.C. § 3553(a). *See United States v. Sharp,* 436 F.3d 730, 738-39 (7th Cir.2006). Any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness. *See United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir.2005). "This standard is deferential; a defendant can only rebut the presumption by demonstrating that the sentence is unreasonable when measured against the § 3553(a) factors." *Sharp,* at 738.

[5] In this case, the district court did not impose an unreasonable sentence. With the exception of contesting the enhancements, neither of the parties contends that the district court erred in his calculation of the proper Guidelines range. At the sentencing hearing, the district court heard from both parties regarding what would constitute a proper sentence. In its comments, the district court clearly demonstrated an understanding of its post-*Booker* responsibilities and a concern for weighing the different mitigating and aggravating factors. The district court expressly considered a number of the § 3553(a) factors, including the nature of the offense, the seriousness of the offense, and the deterrence effect of any sentence. Going beyond these factors, the district court recognized the many good deeds that Ellis has done throughout his life, as well as his health and family circumstances. Still, the district court felt that a sentence at the low end of the Guidelines range was most appropriate for Ellis's actions. While we would not necessarily impose the same sentence as the district court, our inquiry is bound by substantial deference to it. The district court went through the proper steps, and we do not find that the sentence imposed is unreasonable.

III.

Ellis committed a serious crime. He abused his position as bishop while pursuing his scheme to cheat the IRS. The district court thoughtfully weighed the various considerations bearing on Ellis's sentence and selected a reasonable one. Therefore, we Affirm the decision of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES of America,
Appellee,

v.

Ontario SPENCER,
Defendant-Appellant.

Docket No. 05-0483.

Sept. 21, 2005.

Appeal from the United States District Court for the Eastern District of New York (John Gleeson, Judge).

Yuan Chung Lee, Federal Defender Division, Legal Aid Society, New York, New York, for Appellant.

Paige Peterson, Assistant United States, Attorney (Peter A. Norling, Assistant United States Attorney, on the brief), for Roslynn R., Mauskopf, United States Attorney for the Eastern District of New York, Brooklyn, New York, for Appellee.

Present: MINER, RAGGI, Circuit Judges, KARAS, District Judge. [FN1]

[FN1] The Honorable Kenneth M. Karas, of the United States District Court for the Southern District of New York, sitting by designation.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, *16 AND DECREED that the judgment of the district court, entered on January 27, 2005, is hereby AFFIRMED.

Defendant-appellant Ontario Spencer, who was convicted after a guilty plea of being a felon in possession of a firearm, see18 U.S.C. §§ 922(g)(1), 924(a)(2), appeals his 78-month incarceratory sentence as unreasonable. We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision.

After the Supreme Court's ruling in *United States v. Booker*, we "review sentencing decisions for unreasonableness." 543 U.S. 220, 125 S.Ct. 738, 767, 160 L.Ed.2d 621 (2005). This standard of review is necessarily "deferential," *United States v. Canova*, 412 F.3d 331, 350 (2d Cir.2005), because " 'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries," *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir.2005). While the "brevity or length of a sentence can exceed the bounds of 'reasonableness,' we anticipate encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir.2005); cf. *United States v. Godding*, 405 F.3d 125, 127 (2d Cir.2005) (*per curiam*) (noting, in connection with *Crosby* remand, "that the brevity of the term of imprisonment imposed ··· does not reflect the magnitude" of crime). More often, a reasonableness challenge will require us to "focus ··· on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d at 350; *see United States v. Booker*, 125 S.Ct. at 766 (noting that § 3553(a) factors "will guide appellate courts, as they have in the past, in deciding whether a sentence is unreasonable"). In that respect, we impose no "rigorous requirement of specific articulation by the sentencing judge." *United States v. Crosby*, 397 F.3d at 113.

We have specifically declined to "fashion any *per se* rules as to the reasonableness of every sentence within an applicable guide-

line or the unreasonableness of every sentence outside an applicable guideline." *Id. at 115.* Despite acknowledging this precedent, the government urges us to join those of our sister circuits who employ a rebuttable presumption of reasonableness with respect to sentences falling within accurately calculated Guidelines ranges. *See, e.g., United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir.2005); *United States v. Lincoln,* 413 F.3d 716, 717 (8th Cir.2005); *United States v. Gonzalez,* 134 Fed.Appx. 595, 598 (3d Cir.2005) (unpublished order);[FN2] *see also United States v. Mares,* 402 F.3d 511, 519 (5th Cir.2005) ("[I]t will be rare for a reviewing court to say ··· a sentence [within a properly calculated Guidelines range] is 'unreasonable.' "). We decline this invitation. Applying the principles already articulated in our circuit's post-*Booker* precedents, we can easily conclude, without affording a specific presumption of reasonableness to Guidelines sentences, that the sentence at issue in this case was reasonable. *Cf. United States v. Winingear,* 422 F.3d 1241, 1246 (11th Cir.2005) ("The government urges us to hold that sentences within the Guideline range are *per se* reasonable, but we need not address whether or how much deference is owed sentences within the applicable Guideline range to determine that Winingear's sentence was reasonable.")

***17** Spencer advances three arguments to support his reasonableness challenge: (1) the district court "may have given undue weight" to the Sentencing Guidelines at the expense of other § 3553(a) factors, Appellant Br. at 27; (2) the applicable Guidelines range is unreasonable in (a) placing Spencer in Criminal History Category VI and (b) "double counting" his two prior drug convictions in calculating both his offense level and his criminal history category, *id.* at 25-26; and (3) a 78-month sentence is excessive in light of the § 3553(a) factors. None of these arguments has merit.

The first argument is belied by the record, which clearly reveals the district court's faithful discharge of its statutory duty to consid-

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[FN2] Under Third Circuit practice, a court may rely on an unpublished order that, while "not regarded as binding authority," nonetheless provides "a paradigm of the legal analysis [the court] should ··· follow." *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 865 (3d Cir.1996) (citing Internal Operating Procedure 5.8

er all § 3553(a) factors in imposing Spencer's sentence. As for the Sentencing Guidelines, the district court specifically acknowledged its willingness "to quarrel" with the severity of Guidelines sentencing ranges for certain offenses. Nevertheless, because of the seriousness of Spencer's offense of conviction-a factor properly considered under § 3553(a)(1), (2)(A)-and the risk of recidivism presented by his long criminal history-a factor properly considered under § 3553(a)(1), (2)(B)-the court noted its independent determination that the Guidelines range (whether calculated by reference to a Criminal History Category of V or VI) was not "too onerous" to do justice in Spencer's case. Sentencing Tr. at 10. Before imposing sentence, however, the court noted various factors favorable to Spencer, particularly with respect to his care of his mother, as well as Spencer's "track record of conviction," which demonstrated his disturbing inability "to avoid committing crimes when ··· on the street." *Id.* at 10. The district court cited the former mitigating factor in imposing a concurrent rather than consecutive sentence, but it noted the latter aggravating factor as the reason for its imposition of a lengthy prison term. Rather than reflecting an erroneous reliance on a single § 3553(a) factor, this careful analysis of the totality of relevant sentencing factors by the district court might well serve as a model for post-*Booker* sentencing proceedings.

Spencer's remaining challenges merit little discussion. His assertion that the Guidelines criminal history categories V and VI are reserved for "the worst of the worst," specifically "mass murderers, drug kingpins, or violent career criminals," Appellant Br. at 25, is wrong. Under the Guidelines, criminal history does not attempt to gauge the seriousness of the crime of conviction; rather it " 'estimates the likelihood of recidivism.' " *United States v. Morris,* 350 F.3d 32, 37 (2d Cir.2003) (quoting *United States v. Campbell,* 967 F.2d 20, 24-25 (2d Cir.1992)); *see generally* U.S.S.G., Ch. 4, Pt. A, Intro. Comm. (discussing relevance of prior criminal history to factors set forth in 18 U.S.C. § 3553(a)(2)). The district court plainly understood this purpose, and its independent conclusion that Spencer's history revealed a stubborn refusal to conform his conduct to law can hardly be labeled unreasonable.

This court has previously rejected challenges to the Sentencing Guidelines' use of a prior conviction to calculate both offense level

and criminal history category. See *United States v. Campbell*, 967 F.2d at 24; *see also United States v. Aska*, 314 F.3d 75, 78 (2d Cir.2002). Nothing in *Booker* requires us to reconsider that conclusion.

Finally, Spencer's argument that his 78-month sentence is "greater than necessary" to serve the purposes identified in § 3553(a)(2), Appellant Br. at 29, is unconvincing in light of the seriousness of his crime of conviction, the fact that he committed the crime within a month of release ***18** from custody, his extensive criminal record, and the sentencing court's careful consideration of these and the other factors outlined in § 3553(a). As we noted in *United States v. Fleming*, 397 F.3d at 100, only rarely will the length of a sentence by itself demonstrate unreasonableness. This is not such a case.

The judgment of the district court, entered on January 27, 2005, is hereby AFFIRMED.

APPENDIX C

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense.

(2)

FILED
AUG 17 2006
OFFICE OF THE CLERK
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No. 06-111

In the Supreme Court of the United States

WILLIAM A. ELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable. A number of petitions for a writ of certiorari have recently been filed challenging the application of a presumption that sentences within a properly calculated advisory Guidelines range are reasonable on appellate review. As the government has explained in briefs in opposition to those petitions, according a Guidelines sentence a presumption of reasonableness is consistent with *Booker* and with the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, and does not make the Guidelines effectively mandatory; it is not clear that reasonableness review is materially different in circuits that have adopted the presumption than in those that

have not; and petitions raising presumption-of-reasonableness challenges need not be held pending the disposition of *Cunningham* v. *California*, No. 05-6551, cert. granted (Feb. 21, 2006). See, *e.g.*, Gov't Br. in Opp. at 7-15, *Guzman-Balbuena* v. *United States*, No. 05-10634, 2006 WL 2089475 (filed June 29, 2006); Gov't Br. in Opp. at 13-21, *Artis* v. *United States*, No. 05-10431, 2006 WL 1733084 (filed June 19, 2006). Accordingly, for the reasons set out in the briefs in opposition to those petitions, the petition for a writ of certiorari should be denied.*

PAUL D. CLEMENT
Solicitor General

AUGUST 2006

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* The government waives any further response to the petition unless this Court requests otherwise.